TUAN MAT TUAN ISMAIL v. ETIQA TAKAFUL BHD

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
ANANTHAM KASINATHER JCA
MAH WENG KWAI JCA
[CIVIL APPEAL NO: D-02(NCVC)(A)-158-01-2013]
17 DECEMBER 2014

LAND LAW: *Charge – Validity of – Restriction in interest on document of title – Chargee a takaful entity – Whether chargee a financial institution – Whether chargee fell under exemption to restriction – Kelantan Malay Reservations Enactment 1930, Schedule D – Kelantan Land Enactment 1938, Schedule 26A*

LAND LAW: *Charge – Creation of – Third party charge – Restriction in interest on document of title – Whether condition for exemption to restriction satisfied – Whether charge valid and enforceable*

This was an appeal from the decision of the High Court dismissing the plaintiff/appellant's claim for a declaratory order to set aside the memorandum of charge under s. 417 of the National Land Code and the order for sale made in favour of the defendant/respondent. The appellant had executed a memorandum of charge in respect of two properties ('the subject lots') as security for an Islamic financing facility granted by the respondent to SKKPJ (Tanah Merah) Development Sdn Bhd ('SKKPJ'). The appellant's challenge on the validity of the charge, on the ground that the charge contravened the restriction in interest endorsed on the document of title, was dismissed by the High Court. The main issue raised by the appellant was the invalidity of the charge as it was a third party charge by SKKPJ, who was not the proprietor of the subject lots, to the respondent, which was not a bank or financial institution. The sole issue for the court's determination was whether the charge registered over the subject lots was valid.

Held (dismissing appeal with costs)
Per Zaharah Ibrahim JCA delivering the judgment of the court:

(1) The respondent was a takaful entity, which must have been registered under the Takaful Act 1984 ('the Act'). Based on the definition of takaful under the Act, the respondent would be a financial institution in the wider sense of an institution providing financing. (paras 36 & 37)

(2) When the memorandum of charge was presented in 2003, the land office accepted the memorandum and registered the charge. The land office would be the best authority to know if the respondent, in whose favour the memorandum of charge was executed, was an institution listed in Schedule D to the Kelantan Malay Reservations Enactment 1930 ('1930 Enactment') or Schedule 26A to the Kelantan Land Enactment 1938 ('1938 Enactment'). (para 38)

(3) Schedule D to the 1930 Enactment and Sch. 26A to the 1938 Enactment clearly listed Takaful Nasional Sdn Bhd (the previous name of the respondent) as one of the institutions to whom land in Kelantan may be charged. Therefore, the respondent was a financial institution to whom the subject lots could be charged under the exemption to the restriction. (paras 42 & 44)

(4) The charge was a third party charge and the state authority had given its consent to the subject lots to be charged. Although the consent was for SKKPJ to charge the land to the respondent, it would satisfy the condition in the restriction. The consent, read together with the exemption to the restriction on the charging of the subject lots, and the fact that the appellant was the chargor named in the memorandum of charge meant that the state authority had consented to the charging of the subject lots to the respondent will full knowledge that the purpose of the charge was to secure a loan given to SKKPJ. The charge was therefore valid and enforceable. (paras 45-49)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan daripada keputusan Mahkamah Tinggi menolak tuntutan plaintif/perayu untuk perintah perisytiharan mengenepikan memorandum gadaian di bawah s. 417 Kanun Tanah Negara dan perintah jualan yang memihak kepada defendan/responden. Perayu telah memeterai satu memorandum gadaian berkaitan dengan dua bidang hartanah ('lot-lot tersebut') sebagai jaminan bagi kemudahan pembiayaan Islam yang diberikan oleh responden kepada SKKPJ (Tanah Merah) Development Sdn Bhd ('SKKPJ'). Cabaran perayu terhadap kesahan gadaian tersebut, atas alasan bahawa gadaian tersebut melanggar sekatan kepentingan yang terendors di atas dokumen hak milik, telah ditolak oleh Mahkamah Tinggi. Isu utama yang dibangkitkan oleh perayu adalah ketaksahan gadaian tersebut kerana ia adalah gadaian pihak ketiga oleh SKKPJ, yang bukan pemilik lot-lot tersebut, kepada responden, yang adalah bukan sebuah bank atau institusi kewangan. Satu-satunya isu untuk pertimbangan mahkamah adalah sama ada gadaian yang didaftarkan terhadap lot-lot tersebut sah.

Diputuskan (menolak rayuan dengan kos)
Oleh Zaharah Ibrahim HMR menyampaikan penghakiman mahkamah:

(1) Responden merupakan entiti takaful, yang sepatutnya berdaftar di bawah Akta Takaful 1984 ('Akta'). Berdasarkan definisi takaful di bawah Akta tersebut, responden adalah institusi kewangan dalam maksud luas institusi yang memperuntukkan pembiayaan.

(2) Semasa memorandum gadaian dikemukakan pada tahun 2003, pejabat tanah menerima memorandum tersebut dan mendaftarkan gadaian. Pejabat tanah adalah pihak yang berkedudukan paling baik untuk mengetahui sama ada responden, yang bagi pihaknya memorandum

gadaian telah dimeterai, adalah suatu institusi yang tersenarai dalam Jadual D kepada Enakmen Tanah Rizab Melayu Kelantan 1930 ('Enakmen 1930') atau Jadual 26A kepada Enakmen Tanah Kelantan 1938 ('Enakmen 1938'). A

(3) Jadual D kepada Enakmen 1930 dan Jadual 26A kepada Enakmen 1938 jelas menyenaraikan Takaful Nasional Sdn Bhd (nama terdahulu responden) sebagai salah satu institusi yang kepadanya tanah di Kelantan boleh digadai. Oleh itu, responden adalah institusi kewangan yang kepadanya lot-lot tersebut boleh digadaikan di bawah pengecualian terhadap sekatan. B

(4) Gadaian tersebut adalah gadaian pihak ketiga dan Pihak Berkuasa Negeri telah memberikan persetujuan untuk lot-lot tersebut digadaikan. Walaupun persetujuan tersebut adalah untuk SKKPJ menggadai tanah tersebut kepada responden, ia memenuhi syarat dalam sekatan. Persetujuan tersebut, dibaca bersama dengan pengecualian terhadap sekatan bagi penggadaian lot-lot tersebut, dan fakta bahawa perayu adalah penggadai yang dinamakan dalam memorandum gadaian membawa maksud bahawa Pihak Berkuasa Negeri telah menyetujui gadaian lot-lot tersebut kepada responden dengan pengetahuan penuh bahawa tujuan gadaian tersebut adalah untuk menjamin pinjaman yang diberikan kepada SKKPJ. Gadaian tersebut oleh itu adalah sah dan boleh dikuatkuasakan. C D E

Legislation referred to:
National Land Code, s. 417
Kelantan Land Enactment 1938, s. 104
Kelantan Malay Reservations Enactment 1930, s. 9A F

For the appellant - Mahinder Singh Dulku; M/s Mahinder Singh Dulku & Co
For the respondent - Mohd Rosly Khadi Mohd Ayub Khan; M/s Hisham, Sobri & Kadir

[Appeal from High Court, Kota Bharu; Originating Summon No: 24NCVC-66-11-2011]

Reported by S Barathi G

JUDGMENT

Zaharah Ibrahim JCA:

Introduction H

[1] This was an appeal from the decision of the High Court of Malaya at Kota Bharu dismissing the appellant/plaintiffs claim, made by way of originating summons, for a declaratory order to set aside the memorandum of charge under s. 417 National Land Code and the order for sale dated 22 August 2010 made in favour of the respondent/defendant. For ease of reference the parties will be referred to as they were in the High Court. I

[2] We heard the appeal on 21 June 2013 and unanimously dismissed the appeal.

[3] Our brother Anantham Kasinather JCA, has since retired.

[4] Before hearing the appeal, counsel for the defendant sought my recusal as I was on the panel that heard and allowed the appeal by the plaintiff on 31 May 2012 against the order of the High Court striking out the originating summons. I declined to recuse myself as that panel did not deal with the merits of the case.

Background

[5] The plaintiff had executed a memorandum of charge (Presentation No. 848/2003) in respect of two properties, namely, Lots 1011 and 1012, Mukim Jeli Tepi Sungai, Daerah Jeli, Kelantan, ('subject lots') held under State Lease 1240 and State Lease 1241, respectively. The memorandum of charge was registered on 9 April 2003.

[6] The defendant applied by way of originating summons for an order for sale of the subject lots.

[7] Before the High Court heard the application for order for sale, issues of forgery of the plaintiffs signature on the memorandum of charge and issues of the charge being for the benefit of a company called SKKPJ (Tanah Merah) Development Sdn Bhd were raised. The learned High Court Judge converted the originating summons into writ action and heard evidence thereon.

[8] On 22 August 2010, an order for the sale ('order for sale') of the two subject lots was made by the High Court at Kota Bharu. The initial date for public auction of the subject lots was fixed for 22 October 2010.

[9] The plaintiff filed a notice of appeal to the Court of Appeal, but neglected to file and serve the record of appeal within the prescribed time.

[10] The plaintiff then applied by way of a notice of motion (encl. 7a) to the Court of Appeal for extension of time to file and serve the record of appeal, and had also at the same time filed a motion (encl. 6a) for the stay of execution of the order for sale.

[11] On 14 November 2011, both motions were dismissed by the Court of Appeal. The deposit of RM500 paid by the plaintiff was ordered to be the costs to be paid to the defendant.

[12] The result of the dismissal of the two motions was that the plaintiffs appeal against the order for sale was impliedly struck out.

[13] Meanwhile, on 2 November 2011, while his motions in encl. 7a and 6a were still pending in the Court of Appeal, the plaintiff filed an application by way of originating summons (encl. 2), seeking the following orders:

(i) That the memorandum of charge under Presentation No. 848/2003 be cancelled and removed from the register and issue documents of title of the subject lots; and

(ii) That the order for sale be set aside forthwith and the originating summons pursuant to which the order for sale was made be dismissed with costs.

[14] The High Court struck out the plaintiffs encl. 2 on the grounds of *res judicata*. Against that decision the plaintiff appealed to this court and that appeal was allowed on 31 May 2012. The case was remitted to the High Court to be heard on its merits. This was the appeal referred to in para. 4 above.

[15] After full hearing of encl. 2, the High Court dismissed encl. 2. This appeal before us was the appeal against that decision after full hearing.

Issues Before The High Court

[16] The main ground given by the plaintiff for his application was that the charge over the subject lots contravened the restriction in interest endorsed on the document of title and that therefore the charge was null and void and had no effect.

[17] The titles for the subject lots were endorsed with the following restrictions in interest:

> Tanah yang terkandung dalam hakmilik ini tidak boleh dipindahmilik, digadai, dipajak atau dibuat apa jua perkiraan dengan tidak terlebih dahulu mendapat Kebenaran Bertulis daripada Pihak Berkuasa Negeri.
>
> Tanah yang terkandung dalam hakmilik ini tidak boleh dipecah sempadan, dipecah bahagian atau dicantum dengan tidak terlebih dahulu mendapat Kebenaran Bertulis daripada Pihak Berkuasa Negeri.

[18] However, the restriction on the charging of the subject lots was subject to the following exemption:

> Tanah yang terkandung dalam hakmilik ini dikecualikan bagi gadaian kepada Bank atau Institusi Kewangan yang disenaraikan di dalam Jadual D Enakmen Rizab Melayu Kelantan 1930 dan Jadual 26A Enakmen Tanah Kelantan 1938 bagi membolehkan tuan tanah mendapat pinjaman sendiri.

[19] The State Authority had given its consent for the subject lands to be charged to the defendant, but the consent was given to SKKPJ (Tanah Merah) Development Sdn Bhd ('SKKPJ'), not to the plaintiff.

[20] It was argued before the High Court by the plaintiff that the defendant was neither a bank nor a financial institution but an insurance company and therefore could not come within the exemption.

[21] It must be noted that before the High Court, the issue of the plaintiffs signature having been forged was not raised in submissions.

[22] However, quite unfortunately, the entire judgment of the learned High Court Judge was devoted to the issue of forgery.

Grounds Of Appeal

[23] The plaintiffs grounds in his memorandum of appeal were confined only to the issue of invalidity of the charge as it was a third party charge by SKKPJ who was not the proprietor of the subject lots, to the defendant which was not a bank or financial institution.

[24] The plaintiff contended that the learned High Court Judge had failed to appreciate the true basis of the prayers in the originating summons in encl. 2.

Decision

[25] We agreed with the plaintiff that the learned High Court Judge had failed to appreciate that the application in encl. 2 was based purely on the plaintiff's contention that the charge over the subject lots was invalid.

[26] The sole issue before us therefore was whether the charge registered over the subject lots was valid.

Who Charged The Subject Lots?

[27] The copies of the issue documents of title for the subject lots exhibited by the plaintiff in his affidavits showed very clearly that the person who charged the subject lots was the plaintiff himself.

[28] Form 16A exhibited as exh. 'TM-2' to the plaintiff's affidavit indicated that the plaintiff charged the subject lots as security for an Islamic financing facility granted by the defendant to SKKPJ.

[29] Therefore, the fact that the chargor of the subject lands was the plaintiff himself as the registered proprietor of the lots was not in dispute.

[30] The issue of whether his signature was forged had been raised in the earlier proceedings as being cause to the contrary to resist the application for order for sale. That challenge ended with the Court of Appeal orders dated 14 November 2012.

[31] In any case, the issue that the plaintiff was not the person who signed the memorandum of charge was not raised in the memorandum of appeal or during submissions before us.

Was The Defendant A Bank Or Financial Institution?

[32] The exemption to the restriction on the charging of the subject lots was:

> Tanah yang terkandung dalam hakmilik ini dikecualikan bagi gadaian kepada Bank atau Institusi Kewangan yang disenaraikan di dalam Jadual D Enakmen Rizab Melayu Kelantan 1930 dan Jadual 26A Enakmen Tanah Kelantan 1938 bagi membolehkan tuan tanah mendapat pinjaman sendiri.

[33] The plaintiff argued that as the defendant was neither a bank nor a financial institution, the subject lots could not be charged to the defendant.

[34] The defendant was not a bank. That much was not in dispute. Was it however a financial institution for the purposes of the exemption to the restriction in interest?

[35] The term 'financial institution' was not defined in the National Land Code, or the Kelantan Land Enactment 1938 (of which s. 104 dealing with sale and charge of land was among the provisions saved from repeal by the National Land Code), or the Kelantan Malay Reservations Enactment 1930.

[36] The defendant was a takaful entity. It must have been registered, at the material time, under the Takaful Act 1984. Under that Act, 'takaful' is defined as follows:

> 'Takaful' means a scheme based on brotherhood, solidarity and mutual assistance which provides for mutual financial aid and assistance to participants in case of need whereby the participants mutually agree to contribute for that purpose;

[37] In our view, based on that definition, the defendant would be a financial institution in the wider sense of an institution providing financing.

[38] The fact remained that when the memorandum of charge was presented in 2003, the land office accepted the memorandum and registered the charge. The land office would be, in our view, the best authority to know if the defendant, in whose favour the memorandum of charge was executed, was an institution listed in sch. D to the Kelantan Malay Reservations Enactment 1930 or sch. 26A to the Kelantan Land Enactment 1938.

[39] During the hearing of the appeal, we sought assistance from the parties to produce before us the said schedules but neither side was able to do so.

[40] We had on our own obtained from the court's library a copy of the enactments.

[41] A close examination of sch. D to the Kelantan Malay Reservations Enactment 1930 and sch. 26A to the Kelantan Land Enactment 1938 showed that there were within the lists in the schedules bodies that would not ordinarily be construed to be financial institutions. Examples of those were Lembaga Perancang Keluarga Negara Malaysia and Petronas.

[42] More importantly however, sch. D to the Kelantan Malay Reservations Enactment 1930 and Schedule 26A to the Kelantan Land Enactment 1938 clearly listed Takaful Nasional Sdn Bhd (the previous name of the defendant) as one of the institutions to whom land in Kelantan may be charged.

[43] Takaful Nasional Sdn Bhd was added to the lists by way of orders made under s. 9A of the Kelantan Malay Reservations Enactment 1930 and s. 104 of the Kelantan Land Enactment 1938 and published in the Kelantan State Gazette on 10 May 2001 as Kn. P.U. 15 and Kn. P.U.16 of 2001, respectively.

[44] There was therefore no doubt that the defendant was a financial institution to whom the subject lots could be charged under the exemption to the restriction to the charging of the subject lots.

Third Party Charge

[45] The charge was without doubt a third party charge. The plaintiffs argument was that as it was a third party charge, the exemption to the restriction in interest did not apply since that exemption applied only "bagi membolehkan tuan tanah mendapat pinjaman sendiri" (to enable the proprietor to obtain a loan for himself).

[46] It was not in dispute that the State Authority had given its consent to the subject lots to be charged, although the consent was for SKKPJ to charge the land to the defendant.

[47] In our view, the consent for the charging of the subject lots would satisfy the condition in the restriction 'Tanah yang terkandung dalam hakmilik ini tidak boleh dipindahmilik, digadai, dipajak atau dibuat apa jua perkiraan dengan tidak terlebih dahulu mendapat Kebenaran Bertulis daripada Pihak Berkuasa Negeri' despite SKKPJ being named as the proposed chargor.

[48] This consent, read together with the exemption to the restriction on the charging of the subject lots, and the fact that the plaintiff was the chargor named in the memorandum of charge, could only mean one thing:

> ... the State Authority consented to the charging of the Subject Lots to the Defendant (an institution named in the Schedules D and 26A to the relevant Enactments) with full knowledge that the purpose of the charge was to secure a loan given to SKKPJ.

Conclusion

[49] On the basis of the above analysis, we found that the charge of the subject lots was valid and enforceable. We therefore dismissed this appeal with costs of RM5,000.